

October 13, 2005

Civil Division-Kent County (739-7641)

Mr. Richard Alexander
207 Cobblecreek Curve
Newark, DE 19702

Mr. David G. Lawson
5105 N. DuPont Highway
Dover, DE 19901

Mr. Michael S. Bundeck
230 Main Street Little Creek
Dover, DE 19901

**Re: Freedom of Information Act Complaint
Against Town of Cheswold**

Gentleman:

On July 8, 2005, our Office received complaints from Messrs. Alexander and Bundeck alleging that the Town of Cheswold ("the Town") violated the open meeting and public records requirements of the Delaware Freedom of Information Act, 29 Del. C. Chapter 100 ("FOIA"). On July 11, 2005, our Office received a complaint from Mr. Lawson making many of the same allegations.¹

The three complaints allege the following violations of FOIA: (1) the Town Council did not post timely public notice of a meeting held on July 7, 2005; (2) the venue for the July 7, 2005 meeting of the Council was too small to accommodate the public; (3) the Town Council met in executive session on July 7, 2005 for purposes not authorized by law; (4) the Town Council

¹ Mr. Lawson also complained about a business license fee recently imposed by the Town: "Not only did we only get two days notice that this fee was due" but the "letter was not even signed by the tax collector, Robert Sign. Furthermore, the letter did not include when this ordinance was passed." Those issues are outside our jurisdiction under FOIA.

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reached a consensus on matters of public business in executive session before voting on those matters in public without any further discussion; (5) the Town did not prepare and maintain minutes of the July 7, 2005 meeting; and (6) the Town did not provide Mr. Bundeck with access to the minutes of prior Council meetings.

By letter dated July 9, 2005, we asked the Town to respond to your complaints by July 20, 2005 and "provide us with a copy of the notice, agenda, and minutes for the meeting held on July 7, 2005, including the minutes of any executive session which we will review *in camera* and treat confidentially."

By letter dated July 29, 2005, the Town Solicitor advised that he had "been unable to check the record, and therefore I am requesting a ten (10) day extension of time to respond to the complaints." We received the Town's response on July 26, 2005 including the draft minutes of the July 7, 2005 Council meeting. The Town noted that "these minutes have not been approved by Council and will not be considered until their next meeting, which is August 1, 2005."

On August 24, 2005, we asked the Town for a copy of the approved minutes of the July 7, 2005 Council meet, which we received on September 6, 2005.

On October 3, 2005, we asked the Town for additional information regarding any discussions of the Town's 2005-2006 budget. We received that information on October 5, 2005.

According to the Town, the Town Clerk posted the notice and agenda for the July 7, 2005 meeting on June 27, 2005 on the door of the Town Hall at least seven days in advance as required by FOIA. The copy of the notice and agenda provided to us by the Town confirms this fact. We determine that the Town did not violate the public notice requirements of FOIA with respect to the

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July 7, 2005 meeting of the Town Council.

Mr. Bundeck's complaint alleged that he requested copies of minutes of prior Town Council meetings sometime during the week of July 1- July 7, 2005. According to the Town, "Mr. Bundeck was one of five persons who requested [minutes of prior meetings]" during that week (which included the July 4 holiday weekend) and the Town Clerk "simply did not have the time or resources to produce copies, which covered approximately 45 pages, upon short notice. . . . Subsequently, copies have been made for all five persons who made the request." It appears that Mr. Bundeck's public records complaint is resolved so we will not address it further in this opinion.²

Mr. Lawson alleged that the Town Council did not provide reasonable access to the public to attend the meeting on July 7, 2005 because the Town Hall "has a meeting space limited to twelve persons." The Town responds that "Mr. Lawson does not indicate that anyone was excluded because of lack of space nor is there any indication that he or anyone else made any complaint at the Council meeting to this effect. Cheswold Town Hall is an old home but it has the ability to accommodate more than 12 persons as spectators to the meeting."

Your complaints acknowledge that, in addition to Messrs. Lawson and Bundeck, there were a number of citizens who attended the July 7, 2005 meeting: Mrs. Harmon, Mrs. Durham, Drew Volturo of the *State News*, Harvey Reed, and six other persons identified only by first name,

² We note that the "'reasonable access' requirement of FOIA" does not "mean that a public body must provide access, on short-notice demand, at any time or place. The FOIA Declaration of Policy states that citizens should have 'easy access' to public records. 29 *Del. C.* §10001. It does not say that they must have instantaneous access." *Att'y Gen. Op.* 97-IB14 (July 29, 1997). We have previously determined that, as a general rule, FOIA requires the custodian of a public record to make it available within ten days of a request. *Att'y Gen. Op.* 03-IB26 (Nov. 13, 2003).

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occupation, residence, age or gender. There is nothing in the record to show that members of the public who wished to attend the July 7, 2005 Town Council could not because of the size of the meeting room. We determine that the Town did not violate FOIA's requirement that a public body provide reasonable access to the public to attend the Council meeting on July 7, 2005. *See Att'y Gen. Op. 02-IB09* (Apr. 12, 2002) (nothing in the record to show that members of the public "were turned away or unable to participate in the discussion of public business" because of the size of the town council chambers). ³

The Council has provided for our *in camera* review a copy of the minutes of the July 7, 2005 executive session of the Town Council. Mr. Lawson's allegation that the Town did not prepare minutes of that meeting in violation of FOIA is unfounded.

The remaining allegation for our consideration is whether the Town Council met in executive session on July 7, 2005 to discuss matters of public business for a purpose or purposes authorized by FOIA?

Relevant Statutes

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b),(c), (d), or (g) of this section." 29 *Del. C.* §10004(a).

Subsection (b) of Section 10004 authorizes a public body to meet in executive session to

³ We note "that if a public body has reason to know that a large number of citizens is likely to attend a meeting, then FOIA requires the public body to find another, larger place for the meeting. Alternatively, in the event of an overflow, a public body should consider adjourning the meeting to another time at a facility that can accommodate all of the interested citizens." *Att'y Gen. Op. 02-IB09* (Apr. 12, 2002).

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discuss nine subject matters, including "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employer or student requests that such a meeting be open." *Id.* §10004(b)(9).

"Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public." *Id.* §10004(c).

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." *Id.* §10001(e).

FOIA provides that "the burden of proof shall be on the . . . public body to justify a decision to meet in executive session" *Id.* 10005(c).

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LEGAL AUTHORITY

According to the Town, "it is obvious from reading the minutes of the [July 7, 2005] executive session that the primary purpose of the same was to consider police department personnel issues, which would be permissible under §10004(b)(9). It does not appear that the other issues noted were 'discussed' and these matters should not have been listed as part of the executive session minutes."

Our *in camera* review of the minutes of the July 7, 2005 executive session shows that the Council addressed four matters: (1) police department personnel issues; (2) real estate taxes; (3) the hiring of a new code enforcement officer and building inspector; and (4) the proposed budget for the 2005-06 fiscal year. ⁴

According to the Town, Items 2, 3, and 4 were informational announcements only and "no discussion followed." The Town does not contend that FOIA authorized the Council to meet in executive session to discuss Items 2, 3, or 4. Rather, the Town contends that these issues were not "discussed" and "should not have been listed as part of the executive session minutes."

Unless authorized by statute for executive session, the open meeting requirements of FOIA apply to any "meeting," defined as "the formal or informal gathering of a quorum of the members of any public body for the purpose of **discussing** or taking action on public business." 29 Del. C. §10001(d) (emphasis added). FOIA does not define "discussing" but the statute distinguishes the

⁴ When we refer to minutes of executive session provided to us *in camera*, we are careful not to disclose any substantive information that FOIA authorizes for private discussion. For matters not authorized for executive session, any portions of the minutes reflecting discussion of those matters are not protected by FOIA and we feel free to refer to those portions of the minutes in greater detail.

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term "discussing" from the term "taking action" by using the disjunctive "or." *See Att'y Gen. Op. IB24* (Aug. 18, 2005) ("The public meeting requirements of FOIA do not turn on whether a public body took official action. Otherwise, 'there would be no remedy to deter Board members from privately meeting for discussion, investigation or deliberation about public business so long as the Board reached no formal decision at that private meeting.'") (quoting *Levy v. Board of Education of Cape Henlopen School District*, C.A. No. 1447, 1990 WL 154147, at p.6 (Del. Ch., Oct. 1, 1990) (Chandler, V.C.)).

We have not had previous occasion to determine what level of interaction among the members of a public body is necessary to amount to "discussing" a matter of public business to trigger the open meeting requirements of FOIA. We do not have to resolve that issue for purposes of this case, however, because the Town: (1) failed to meet its burden of proof whether the Council "discussed" matters of public business (real estate taxes and code enforcement) at the July 7, 2005 executive session; and (2) the record shows that the Town discussed the 2005-2006 Town budget prior to the July 7, 2005 executive session and reached a consensus vote in executive session to approve the final figures without any public discussion.

A. Burden of Proof

Under FOIA, "the burden of proof shall be on the . . . public body to justify a decision to meet in executive session." 29 *Del. C.* §10005(c).

In "our investigations and determinations under Section 10005(e) of FOIA, we must hold public bodies to their burden of proof to justify going into executive session for a purpose authorized

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by statute. If the minutes of the executive session (as here) are cursory, and the public body does not provide us with affidavits from those in attendance specifying in more detail the matters discussed, then the public body may not meet its burden of proof, as in this case." *Att'y Gen. Op.* 03-IB23 (Oct. 20, 2003). "Our Office will hold public bodies to high standards in satisfying their burden of proof to go into executive session. To meet that burden, a public body will have to prepare minutes of executive session that are sufficiently detailed to allow our Office to determine exactly what the public body discussed in executive session." *Att'y Gen. Op.* 03- IB16 (July 14, 2003).

The minutes of the July 7, 2005 executive session are cursory. Item 2 states: "It was announced there would be no new Real Estate Taxes this year and a resolution regarding an assessor was ready to be signed." Item 3 states: "It was announced a new Code Enforcement Officer and Building Inspector would be hired and Mr. Ryan, Town Manager would be Senior Code Enforcement Officer." FOIA did not authorize either of these matters of public business for discussion in executive session, so the public body bears an even heavier burden of proof to show that, in fact, there was no "discussion" at all (which calls into question why the matter was listed in the executive session minutes in the first place). We determine that the Town failed to meet its burden of proof that there was no discussion of these two matters – real estate taxes and new employees – in executive session.

With regard to Item 1 listed in the minutes of the July 7, 2005 executive session, the Town contends that FOIA authorized the Council to discuss in executive session "police department personnel issues." FOIA's personnel exemption only applies when a public body discusses the

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"names, competency, and abilities of individual employees." 29 *Del. C.* §10004(b)(9).

We have previously determined that a town council cannot meet in executive session under FOIA to discuss general issues concerning the police department such as town coverage and work schedules. *See Att'y Gen. Op.* 02-IB12 (May 21, 2002). It is not clear from the cursory minutes of the Town Council's July 7, 2005 executive session exactly what police department matters the Council discussed. The minutes simply state: "Police Department personnel issues were discussed in great detail."

Under other circumstances, we would be inclined to determine that the Town has not met its burden of proof to justify meeting in executive session on July 7, 2005 to discuss the names, competency and abilities of individual police officers. We will give the Town the benefit of the doubt that in the executive session on July 7, 2005 the Council discussed those issues in light of the recent termination of Police Chief Vann.

B. 2005-2006 Town Budget

The minutes of the July 7, 2005 executive session state that "[t]he 2005-2006 Budget has been presented to all Council members prior to meeting. Council was asked if they had any questions -- no questions or discussion followed."

According to the Town, the "Council was given a draft of the 2005-06 budget seven to ten days prior to the July 7, 2005 meeting. The budget was not discussed at a public meeting other than by the Town Manager who had approached all of the Town Council members during the months preceding the meeting for their input into the budget process. The budget was not discussed at the

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special meeting. The Town Manager merely ran the final figures by members of Town Council so they could determine if discussion was needed at the open part of the meeting whether to vote to accept or reject the budget."

Even if, in fact, there was no substantive discussion of the 2005-2006 budget during executive session on July 7, 2005, the Town has acknowledged that there were non-public discussions of the budget prior to July 7, 2005. As a result, at the executive session on July 7, 2005, all that was left to do was review the final figures to decide whether to vote to accept or reject the budget, without any public discussion being required.

We believe that the process by which the Town Council came to approve the 2005-2006 budget violated the open meeting requirements of FOIA. We have previously determined that FOIA does not permit "straw polling" nor does FOIA "allow public bodies to reach 'consensus votes' which they strive later to ratify." *Att'y Gen. Op.* 96-IB15 (May 10, 2996). The record shows that the process by which the Town Council came to approve 2005-2006 Town budget at the July 7, 2005 meeting violated FOIA because it deprived the public of any opportunity to monitor and observe the budget approval process.

We note that the record reveals a close nexus between the matters listed in the minutes of the discussed by the Town Council's executive session on July 7, 2005, and the matters voted on in public session after the Council came out of executive session. The minutes of the executive session list: (1) the hiring of a new code enforcement officer and building inspector; (2) retaining the professional services of a new real estate assessor; and (3) the 2005-06 budget. After the Council

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returned to public session it voted, without any discussion, to: (1) approve a code enforcement department; (2) hire an independent real estate appraiser to reassess all the real estate in Town; and (3) pass the proposed 2005-2006 fiscal year budget. It could appear to the public – as your complaints suggest – that the Council discussed and acted on matters of public business without any opportunity for the public to monitor and observe the Council's decision-making process.

C. Remediation

In the past when we found a violation of the open meeting law we directed remediation if a public body has taken action on a matter affecting "substantial public rights." *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.6 (Del. Ch., Aug. 29, 1986) (Allen, C.). We have previously determined that substantial public rights were affected by: (1) the expenditure of public money (*Att'y Gen. Op.* 02-IB12 (May 21, 2002) (increase the salaries of police officers); (2) hiring key personnel (*Att'y Gen. Op.* 03-IB06 (rev. Feb. 11, 2003) (officer-in-charge of the police department); (3) actions affecting land use (*Att'y Gen. Op.* 02-IB23 (Dec. 23, 2002) (conditional use exception for senior citizen retirement community).

We determine that the Town Council's violations of FOIA affected substantial public rights: the 2005-2006 fiscal year budget involved the expenditure of public funds; code enforcement involved the hiring of key personnel; and the new real estate appraiser affected land use. As remediation, we direct the Town within thirty (30) days of the date of this letter to notice a meeting open to the public to discuss in public and vote again on the these three matters of public business: (1) code enforcement; (2) real estate taxes; and (3) the 2005-06 fiscal year budget.

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Conclusion

For the foregoing reasons, we determine that the Town did not violate FOIA because the Town: (1) posted timely public notice of a meeting held on July 7, 2005; (2) provided the public with reasonable access to attend the July 7, 2005 meeting; (3) prepared and maintained minutes of the July 7, 2005 meeting; and (4) provided reasonable access to minutes of previous meetings of the Town Council.

We determine that the Town violated FOIA by privately discussing the 2005-2006 budget prior to the July 7, 2005 meeting and then approving the budget without any discussion in public thereby depriving the public of the opportunity for the public to monitor and observe the budget approval process. We also determine that the Town failed to meet its burden of proof that it did not discuss two other matters of public business (code enforcement and real estate taxes), neither of which matters FOIA authorized for private discussion.

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As remediation, we direct the Town within thirty (30) days of the date of this letter to notice a meeting open to the public to discuss in public and vote again on these three matters of public business (code enforcement, real estate taxes, and budget). We direct the Town Solicitor to report back to us in writing within ten days after the Town has completed remediation.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin
State Solicitor

cc: The Honorable M. Jane Brady
Attorney General

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